MAR 27 195
JAMES R. BROWNING, Cle

IN THE SUPREME COURT OF THE UNITED STATES

No. 648

MARVIN IRVING TAMARKIN

Petitioner

vs

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR REHEARING

LEONARD EDWARD ABEL, ESQ.
Attorney for Petitioner
420 Lincoln Road
Miami Beach, Florida

IN THE SUPREME COURT OF THE UNITED STATES

No. 648

MARVIN IRVING TAMARKIN

Petitioner

vs

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR REHEARING

The first point the Petitioner raises regards the contents of the relatively long statement of the Respondent (Pages 2 to 8 in the Brief of the Respondent) concerning certain publications contained in the Selective Service File of the Petitioner. Nothing within the Statement indicates that these publications were submitted by the Petitioner when he personally appeared before the local board in March, 1951.

At that personal appearance, the Petitioner, along with other witnesses, gave oral testimony to the local board and it was on the basis of this oral testimony more than the publications brought by the Petitioner to that hearing, that prompted the local board to grant the Petitioner's claim as a conscientious objector and so classi-

fied him unanimously. The brief of the Government omits this very significant fact. The conscientious objector classification remained in effect until the board removed it on December 6, 1951, a period of nine and a half months. The Petitioner was reclassified after the State Headquarters of Selective Service system in a letter dated November 20, 1951 (Item #124, Government's Exhibit #1) stated that, "It is our opinion that he should be classified either 1-A or 1-A-O". The local board then reclassified the Petitioner in accordance with the opinion of the State Headquarters of Selective Service.

The point here is that it would be an improper conclusion to assume that it was the nature of these publications alone which prompted the local board to grant the Petitioner CO status. The unreported testimony of the Petitioner before the local board, the benefit of which was not available to the State Headquarters of Selective Service when it rendered its opinion to the local board in the letter cited supra, was fully controlling of the decision of the local board at the time it granted CO status to the Petitioner.

On page 9 of the Respondent's brief, the Government says, "Vegetarianism cannot be transformed into a religion within the purview of the statute merely because the Petitioner sincerely professes to believe that it is such." The arrant assumption of the Government apparently disregards the countless millions of the Far East to whom Vegetarianism is a way of life by virtue of its being the essence of their religion. Eminent western authorities such as Dr. Albert Schweitzer in his book "Out of My Life and Thought" at Page 230 et seq thoughtfully discusses why his beliefs in vegetarianism is a reverence

for life which is indeed a reverence for all life with "no dividing line between higher and lower, between more valuable and less valuable life . . . The concept for reverence of life has, therefore, a religious character. The man who avows his belief in it and acts upon the belief shows a piety which is elemental." The Government's knowledge of the precepts of Vegetarianism is not so complete nor so profound so as to permit it to make such a unilateral judgment as that expressed in their brief, supra. Nevertheless, the admission of the Government that the Petitioner sincerely professes a religious belief is entirely consonant with the Petitioner's reverence for life which is the elemental basis for the beliefs of all vegetarians who believe in it as a religion. This admission is extremely significant, as shall be shown.

The essential test is not whether Vegetarianism is a religion within the purview of the statute (Section 6J of the Universal Military Training and Service Act; see page 6, Brief of Petitioner). The statute in no way attempts to define acceptable and non-acceptable religions, but on the contrary, places the test squarely upon the individual's belief in relation to a Supreme Being, involving duties superior to those arising from any human relation. Nothing here allows any administrative or judicial trier of fact to decide which beliefs are amenable for consideration for conscientious objection because they are within a compass of conventional concepts of religion and which beliefs are ill-considered because they are not supported by a personally acceptable faith or creed, personally acceptable to the trier of fact, that is.

None of the bodies before whom the Petitioner appeared, be they administrative, quasi-judicial, or judicial,

has ever doubted the sincerity of the Petitioner in his religious beliefs. To deny CO status because it was subjectively decided that Vegetarianism is not a religion, and, therefore, does not come within the requirements of Section 6J, is to allow a dichotomous interpretation of this vital Section to encroach on the intent of Congress when it passed this Statute. It is the individual's beliefs that must be tested, not the creed to which he adheres. UNITED STATES v. KAUTEN, 133 F 2nd 703 (C.A. 2). Congress never intended otherwise—wisely—for it is obvious the test is susceptible to personal prejudice. The KAUTEN case set the law of the land respecting Section 6J. The Court below, by affirming the Trial Court on the evidence submitted, has created a direct conflict of law between the Fifth Circuit and the overwhelming weight of authority of other Circuits as well as this Court. This Court should resolve this conflict by reversing the Court below.

The second point upon which the Petitioner seeks rehearing is to point out to the Court the effect of the holding of the Court below regarding a decisive issue raised ex mero motu in their opinion, reported at 280 F 2d 436; Petitioner's Brief, Appendix A, Page 1-6.

To acquaint the Court with the factual background, Petitioner will first refer the Court to a companion case brought previously by the Petitioner entitled TAMARKIN vs SELECTIVE SERVICE SYSTEM LOCAL DRAFT BOARD #47, 243 F 2d 108 (C.A. 5), certiorari denied without opinion by this Court at 355 U.S. 825.

In this case the Circuit Court of Appeals in a very brief opinion refused to entertain an appeal on the ques-

tion of the right of a registrant to enjoin his local board when it had been alleged that the local board was proceeding illegally by denying the Petitioner procedural due process of law, said Petition for an injunction having been brought prior to the exercise by the registrant of all of his administrative remedies and procedures.

The Court of Appeals felt that the allegations could only be used as defenses in a criminal prosecution against the registrant for refusal to submit to induction, provided the registrant had first exhausted all of his administrative remedies and procedures; the Court cited WITMER v. UNITED STATES, 348 U.S. 375, 75 S Ct. 392 and WATKINS v. RUPERT, 224 F 2d 47 (C.A. 2). These cases were attacks by registrants upon the result reached by the local boards on their draft classifications, and their petitions to enjoin the local board were based upon the allegation that their draft classifications were incorrect; their Petitions were not based upon the allegation that they had been denied procedural due process of law as was alleged by the Petitioner herein. The Court below, in the first case brought by Tamarkin (243 F2d 108; C.A. 5) affirmed the result of the District Court on jurisdictional grounds, stating, "There is no right to a direct judicial review of orders of the Draft Boards." This Court denied certiorari without opinion at 355 U.S. 825. (Compare the holding in TOWNSEND v. ZIMMERMAN, 237 F 2d 376 (C.A. 6) which is contra.)

The net result of the Appeal and the Petition for Writ of Certiorari brought by Tamarkin in his first case was to leave open the question of whether there was a denial of procedural due process of law since no Appellate authority has thus far reviewed the District Court on

this question. In the criminal prosecution from which this present appeal is being taken, the Petitioner raised the defense of a denial of procedural due process of law for the reasons given in his brief (Pages 18-24, Brief of Petitioner). These reasons were the same as those made by Tamarkin in his first case. The District Court again held that there was no such denial; this holding was consistent with the previous holding of the District Court from which the previous appeal had been taken. Since the Court of Appeals in its opinion refused to pass on the question raised by the Petitioner (Petitioner's Brief Appendix A, pages 1-6) and this Court again denied certiorari without opinion, the question of the denial of procedural due process of law as raised by the Petitioner has never had appellate review. The orderly administration of Selective Service regulations requires that this question be reviewed, otherwise the appeals process so painstakingly set forth in the regulations could be circumvented and made a matter of administrative grace because the holding of the Court below will now allow a local board to assert that the result of a review of a classification was not the reopening and consideration anew contemplated by the regulations, but a carry over of a previous classification. This is wholly at odds with the intent and meaning of the regulations (Sections 1625.11, 1625.12, 1625.13, 1625.14, 32 C.F.R.; pgs 3-4 Brief of Petitioner) and deliberately infuses what these regulations sought to prevent. This repelling result should be rejected by this Court. To allow this error to stand uncorrected will impart an instability to the regulations not intended by Congress or the administrators of the Selective Service System and places the Court below in conflict with virtually every other Appellate jurisdiction.

The Government urges that the Petitioner is not entitled to a physical examination and a 21 day waiting period thereafter before he was ordered to report for induction because this procedure had already been performed in a previous classification and the regulations do not spell out that a new physical and the waiting period must be given to the registrant every time his classification is re-opened and considered anew. This argument might have merit were it not for the requirements of Sections 1625.11 and 1628.10 32 C.F.R. and the holdings in case law since the regulations were written. (See Page 4 and 5 of Petitioner's brief for regulations cited.)

In UNITED STATES v. GONZALES, 348 U.S. 407, this Court held that a registrant is entitled to receive a fair resume of the investigation made by the Federal Bureau of Investigation regarding his background in order to afford him an opportunity to answer any derogatory representation contained therein. This requirement for submission of the resume is not a part of the regulations. Yet would the Government say that an Appellate process which deletes the submission of this resume to the registrant would not be defective because it is not in the regulations? To go a step further: Would the Government say that no defect exists when a classification has been re-opened and considered anew, the registrant reinvestigated, but the resume of this second investigation was not given to the registrant because he had been given another one before, in a previous classification?

I am sure that the Government would not want to defend this untenable position, yet it adopts this position collaterally when it argues that a physical examination and the waiting period given in an older classification

can be used in a re-opened and reconsidered classification, because the regulations do not say that the physical examination and the waiting period must be given again. On the contrary, the regulations do require re-examination and the waiting period (cf. pg. 30-31, brief of the Petitioner and regulations and cases cited thereunder; UNITED STATES v. BALOGH, 157 F2d 939, judgment vacated on other grounds, 67 S Ct 625).

The regulations as written do not spell out each and every procedure to be followed by the Selective Service System in re-opened and reconsidered classifications; the intentions of the promulgators were amply covered by the provisions of Section 1625.11, cited supra, and no attempt to twist the English language and the elemental simplicity of its requirements as stated in this regulation can alter its intended effect that a classification, when re-opened and considered anew, must be treated as a new one and as if the registrant had never before been classified. This, to me, means that draft boards, to induct a registrant, must again include **all** of the administrative steps, **bar none**, leading to induction.

When this Court denied certiorari without opinion it gave its stamp of approval to the ruling of the Court below respecting this question, the Court below having decided that the Petitioner's classification was not re-opened and considered anew, but was merely a carry over of a previous classification. The Government concedes at Page 10 of its brief that this ruling was clearly erroneous in that the Petitioner's classification had indeed been re-opened and considered anew by his local board. The ruling of the lower Court has placed it squarely in conflict with the Selective Service System in

the administration of its regulations. (Heretofore the record was devoid of any argument on this point, all parties having agreed that the Petitioner had been reclassified.) In the light of the concession on the part of the Government that the Appellate Court misconstrued the act of the Selective Service System regarding the Petitioner's classification, this misconstruction opens the door leading to administrative injustice. This Court should resolve the error created by the Fifth Circuit by its ruling and reverse on this question also.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari filed by the Petitioner herein should be reheard and said Petition granted.

LEONARD EDWARD ABEL
Attorney for Petitioner

I hereby certify that a true copy of the foregoing Petition for Rehearing was served upon the Solicitor General, Department of Justice, Washington, 25, D. C. on the _____ day of March, A.D. 1959, by air-mail.

LEONARD EDWARD ABEL
Attorney for Petitioner

I hereby certify that a true copy of the foregoing Petition for Rehearing was served by hand upon the United States District Attorney for the Southern District of Florida, at the Federal Courthouse, in Miami, Florida, on the _____ day of March, A.D. 1959.

LEONARD EDWARD ABEL
Attorney for Petitioner